



Implementation of Article 23 of the Basic Law

National Security (Legislative Provisions) Bill

Explanatory Notes

oam
NR216
A24

館獻文港加
Canada-Hong Kong Resource Centre

Gift from

Hong Kong Baptist University Library

Implementation of Article 23 of the Basic Law

National Security (Legislative Provisions) Bill

Explanatory Notes

香港研究

Centre for Hong Kong Research

Crescent Rm 111 • Toronto, ON

Security Bureau
February 2003

An Overview

After extensive consultation, the Hong Kong Special Administrative Region (HKSAR) Government has drafted the National Security (Legislative Provisions) Bill to implement Article 23 of the Basic Law.

The Bill has been drafted in accordance with the principle that the HKSAR shall enact legislation on its own. In no way have Mainland legal concepts been extended to the HKSAR, nor is there any intention to create a new ordinance. Three existing ordinances will be amended to clearly specify those acts endangering national security as required to be prohibited by the Basic Law.

The Bill fully complies with the International Covenant on Civil and Political Rights (ICCPR). Existing freedoms and rights enjoyed by HKSAR residents as guaranteed by the Basic Law will continue to be protected.

In line with usual practice, the HKSAR Government will submit the Bill to the Legislative Council after publishing it in the gazette. Further views from residents and organizations are welcome.

Proposed prohibition of acts endangering national security

Treason

Treason refers to the instigation of foreign invasion, assisting a public enemy at war with the People's Republic of China (PRC), or joining foreign armed forces at war with the PRC.

Secession

Secession refers to the use of war, force or serious criminal means to split the country.

Subversion

Subversion refers to the use of war, force or serious criminal means to overthrow or intimidate the Central People's Government (CPG), or to disestablish the basic system of the state by such means.

Sedition

Sedition refers to inciting others to commit treason, subversion or secession, or inciting others to engage in violent public disorder that would seriously endanger the stability of the PRC.

Theft of state secrets

Slight amendments are proposed to the existing Official Secrets Ordinance to protect information related to national security. In particular, definitions of information on the relations between the Central Authorities and the HKSAR, and information acquired by 'illegal access', are clearly set out in the Bill.

Foreign political organizations

Existing Societies Ordinance definitions will be used to prohibit foreign political organizations or bodies from conducting political activities in the HKSAR, and to prohibit political organizations or bodies of the HKSAR from establishing ties with foreign political organizations or bodies.

Organizations endangering national security

The power to proscribe organizations endangering national security will be strictly regulated. The Secretary for Security can exercise the power only under stipulated conditions. A local organization will not automatically be proscribed even if it is subordinate to a Mainland organization prohibited by the Central Authorities by open decree.

Emergency investigation powers

The Bill clearly specifies that only under exigent situations can a police officer at the rank of Chief Superintendent or above authorize the exercise of emergency investigation powers.

Trial by jury

People charged with treason, secession or subversion must be tried by jury. Those charged with sedition or unlawful disclosure may opt for trial by jury if they so wish.

Protection of human rights

The Bill explicitly stipulates that the interpretation, application and enforcement of all provisions must comply with Article 39 of the Basic Law, which mandates compliance with the standards of international human rights covenants.

Main provisions of the Bill

Treason, subversion and secession

The provisions

Treason	<p>A Chinese national commits treason if he —</p> <ul style="list-style-type: none">(a) with intent to —<ul style="list-style-type: none">(i) overthrow the CPC;(ii) intimidate the CPC; or(iii) compel the CPC to change its policies or measures, joins or is a part of foreign armed forces at war with the PRC;(b) instigates foreign armed forces to invade the PRC with force; or(c) assists any public enemy at war with the PRC by doing any act with intent to prejudice the position of the PRC in the war.
Misprision of Treason	<p>The common law offence of misprision of treason is abolished.</p>
Subversion	<p>A person commits subversion if he —</p> <ul style="list-style-type: none">(a) disestablishes the basic system of the PRC as established by the Constitution of the PRC;(b) overthrows the CPC; or(c) intimidates the CPC, <p>by using force or serious criminal means that seriously endangers the stability of the PRC or by engaging in war.</p>
Secession	<p>A person commits secession if he withdraws any part of the PRC from its sovereignty by —</p> <ul style="list-style-type: none">(a) using force or serious criminal means that seriously endangers the territorial integrity of the PRC; or(b) engaging in war.

Synopsis

- The existing 'treason' offence is substantially narrowed, such as abolishing the equation of assaulting the sovereign with treason. The scope of the offence will be clearly defined.
- 'War' is narrowed to **declared war or open armed conflicts**. General demonstrations or riots will be excluded.
- 'Assisting public enemy' refers to assisting a foreign government or foreign armed forces that are at war with China, and with an intent to prejudice the position of China in the war. **Humanitarian aid to ordinary people will not constitute 'assisting public enemy'.**
- The terms 'instigate' and 'intimidate' etc. originate from existing legislation, and are similar to those of other common law jurisdictions. They will be interpreted in accordance with common law precedents and principles.
- '**Misprision of treason**' is an existing common law offence, which refers to a person who, knowing that another person has committed treason, fails to report the offence to the proper authorities within a reasonable time. **The Bill abolishes this offence to ease public concerns.**
- 'Serious criminal means' originates from the definition of 'terrorist acts' in the United Nations (Anti-Terrorism Measures) Ordinance, and must be a criminal act itself to constitute an offence.
- The relevant offences are committed only when the 'force' or 'serious criminal means' used is so serious that it would **seriously endanger the stability or territorial integrity of the State**. The scope of the offence is narrowly defined and will not affect human rights and freedoms.

Sedition and seditious publication

The provisions

Sedition	<p>A person commits sedition if he —</p> <ul style="list-style-type: none">(a) incites others to commit an offence of treason, subversion or secession; or(b) incites others to engage in violent public disorder that would seriously endanger the stability of the PRC.
Possession of seditious publication	<p>The existing offence of possession of seditious publication is abolished.</p>
Handling seditious publication	<p>A person commits an offence if he —</p> <ul style="list-style-type: none">(a) publishes, sells, offers for sale, distributes or displays any seditious publication;(b) prints or reproduces any seditious publication; or(c) imports or exports any seditious publication, <p>with intent to incite others, by means of the publication, to commit an offence of treason, subversion or secession.</p> <p>‘Seditious publication’ means a publication that is likely to cause the commission of an offence of treason, subversion or secession.</p>

Synopsis

- The offence is committed only if one incites others to seriously endanger the security or stability of the State **by means of war, the use of force, or serious criminal means akin to terrorist acts.**
- The offence of 'sedition' adopts the existing common law concept of 'incitement'. The scope of criminal law is not expanded.
- Regarding seditious publication, the Bill not only **abolishes the existing offence of 'possession of seditious publication'**, but also **substantially narrows the existing scope of 'seditious publication'** by repealing definitions that are too broad and by including the intention to commit a crime as a necessary element. Human rights are fully protected.
- The amendments in the Bill are more protective of the freedom of speech, of the press, of publication, of academic research, literary and artistic creation, etc. compared with existing legislation.

The offence of unlawful disclosure

The provisions

Information related to Hong Kong affairs within the responsibility of the Central Authorities

A person who is or has been a public servant or government contractor commits an offence if he makes, without lawful authority, a damaging disclosure of any information —

- (a) that relates to any affairs concerning the HKSAR which are, under the Basic Law, within the responsibility of the Central Authorities; and
- (b) that is or has been in his possession by virtue of his position as a public servant or government contractor.

A disclosure is 'damaging' if it endangers or would likely to endanger national security.

Information acquired by illegal access

A person possessing any information acquired by means of illegal access, and discloses it without lawful authority and knowing, or having reasonable cause to believe, that the information —

- (a) belongs to a category protected from disclosure under the Official Secrets Ordinance;
- (b) the disclosure of which would be damaging; and
- (c) is acquired by means of illegal access

commits an offence.

'Illegal access' to information is limited to the following circumstances —

- (a) the information comes into or remains in his possession by virtue of an offence of —
 - (i) unauthorized access to computer by telecommunications;
 - (ii) access to computer with criminal or dishonest intent; or
 - (iii) theft, robbery or burglary, committed by him in relation to the information; or
- (b) the information comes into or remains in his possession in exchange for an advantage the offer or acceptance of which is an offence of bribery.

Synopsis

- In line with the constitutional situation after Reunification, and to more clearly stipulate the scope of protected information, the information on the relations between the HKSAR and the Central Authorities will be taken out from the currently protected category of 'international relations', and be strictly defined as information related to the affairs of the HKSAR that are within the responsibility of the Central Authorities under the Basic Law. Therefore, the free flow of economic and commercial information will not be affected.
 - The Bill also stipulates that, to constitute an offence in relation to this category of information, public servants or government contractors must know, or have reasonable cause to believe, that the information in question belongs to the category, and that disclosure of it without lawful authority will, or is likely to, endanger national security.
 - 'National security' is defined according to existing local legislation, i.e. the safeguarding of the territorial integrity and the independence of the PRC.
 - Disclosures that merely cause embarrassment to the Government will not be penalized.
-
- Under existing legislation, it is an offence to make a damaging disclosure of protected information that is disclosed by a public servant without lawful authority. However, it is not an offence if the information in question is obtained through unlawful means such as by theft from a confidential registry of the Government.
 - This is obviously a loophole in the law. The Bill therefore stipulates that it is an offence to make a damaging disclosure, without lawful authority, of protected information obtained as a result of illegal access.
 - To clearly define what constitutes 'illegal access', the Bill limits the term to the acquisition of information by specified criminal acts under Hong Kong laws, i.e. hacking, theft, robbery, burglary and bribery.
 - The offence is very narrowly defined. The elements of the offence are listed clearly in the current legislation and in the Bill. Whether a person is convicted will be determined independently by the courts of Hong Kong.

Proscription of organization endangering national security

The provisions

Proscription of organization endangering national security

The Secretary for Security may by order proscribe any local organization if he reasonably believes that the proscription is necessary in the interests of national security and is proportionate for such purpose.

Such proscription is only applicable to a local organization —

- (a) the objective, or one of the objectives, of which is to engage in treason, subversion, secession or sedition or commit an offence of spying;
- (b) which has committed or is attempting to commit treason, subversion, secession, sedition or an offence of spying; or
- (c) which is subordinate to a mainland organization the operation of which has been prohibited on the ground of protecting the security of the PRC, as officially proclaimed by means of an open decree, by the Central Authorities under the law of the PRC.

‘Subordination’ refers to the following circumstances —

- (a) the local organization solicits or accepts for its operation substantial financial contributions, sponsorship or support, or loans of a substantial amount, directly or indirectly, from the mainland organization;
- (b) the local organization is under the direction or control, directly or indirectly, of the mainland organization; or
- (c) the policies of the local organization are determined, directly or indirectly, by the mainland organization.

Synopsis

- The Bill expressly provides for a number of safeguards in respect of the proscription mechanism.
- The following criteria must be satisfied for the proscription of a local organization that is subordinate to a Mainland prohibited organization:
 - There must be reasonable ground to believe that it is necessary and proportionate for the interests of national security to proscribe the local organization;
 - The Mainland organization concerned must be prohibited by an open decree on the ground of national security by the Central Authorities in accordance with national laws; and
 - There must be evidence, in accordance with the laws of Hong Kong, that the local organization is subordinate to the prohibited Mainland organization (subordination includes acceptance of substantial financial sponsorship from the Mainland organization concerned or being under the control of the Mainland organization). Ordinary connection does not amount to 'subordination'.

A local organization that is subordinate to a prohibited Mainland organization will not be automatically proscribed.

- In addition, the Bill explicitly specifies that the provisions relating to the proscription mechanism must be interpreted, applied and enforced in a manner that is consistent with Article 39 of the Basic Law, which incorporates the ICCPR standards.
- Any decision to proscribe an organization in Hong Kong is subject to appeal, to be adjudicated by the local courts in accordance with Hong Kong laws.
- Articles 27 and 39 of the Basic Law provide constitutional safeguards to freedom of association. Legislation that implements Article 23 and the exercise of the relevant powers are subject to these safeguards.

The provisions

Offence relating to proscribed organization

A person who —

- (a) is or acts as an office-bearer or professes to be or claims to be an office-bearer of;
- (b) manages or assists in the management of;
- (c) is or acts as a member of;
- (d) attends a meeting of; or
- (e) pays money to or gives any other form of aid to,

a proscribed organization is guilty of an offence. Nevertheless, the following circumstances can serve as a defence —

- (a) the person did not know and had no reason to believe that the organization has been proscribed;
- (b) in relation to his being or acting as an office-bearer or a member of an organization, the person had taken all reasonable steps to cease to be such office-bearer or member.

Synopsis

- The decision to proscribe an organization is targeted at the continued operation of the organization. It is not a criminal offence aimed at an individual. A person will be prosecuted **only if he disregards the proscription order and continues to support the operation of the organization after it has been proscribed.**
- Any person who has no knowledge of the proscription of a local organization will not be punished for being an office-bearer or a member of that organization.
- The offence must be adjudicated by the courts in accordance with Hong Kong laws. **No one will be presumed guilty without trial.**

Protection of rights and freedoms

Basic Law

The Basic Law was enacted by the National People's Congress in accordance with the Constitution of the PRC and is the constitutional document of the HKSAR. The systems and policies practised in the HKSAR, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems shall be based on the provisions of the Basic Law.

No law enacted by the legislature of the HKSAR shall contravene the Basic Law, including its provisions on the protection of freedoms and rights.

Freedoms are fundamental rights

In an open and democratic society, the government is subject to close public scrutiny. Protection of the freedom of speech serves to guarantee the rights of the public to form and effectively communicate their opinions, including those that are critical of government policies and measures. The right of assembly and the freedom of association enable citizens to join forces to express their views more effectively.

Freedom of speech, of assembly and of association are not absolute, as the exercise of the rights of the individual can have a detrimental effect on the rights of others and on society as a whole and should therefore be subject to necessary restrictions. As recognized under many international covenants, constitutions and legislation, the exercise of freedoms and rights of the individual carries with it special duties and responsibilities.

Constitutional protection under the Basic Law

Chapter 3 of the Basic Law protects the freedom of speech, of the press, of publication, of association, of assembly, of procession, of demonstration, of religious belief, and the freedom to engage in academic research, literary and artistic creation. Restrictions on such rights and freedoms must comply with the provisions of the two international human rights covenants as applied to Hong Kong.

The ICCPR, which is applied to Hong Kong through Article 39 of the Basic Law, spells out the responsibilities carried with the exercise of the rights and freedoms.

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice (The exercise of the right to freedom of expression) carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;*
- (b) For the protection of national security or of public order (ordre public), or of public health or morals."*

— for details, see Article 19 of the ICCPR

"Everyone shall have the right to freedom of association No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public)"

— for details, see Article 22 of the ICCPR

All laws that implement Article 23 must not contravene the human rights protections stipulated in the Basic Law.

Clear safeguards stipulated by the Bill

The offences are strictly defined in the Bill and they are consistent with the human rights provisions of the Basic Law. No one will mistakenly breach the law.

An internationally renowned specialist in human rights law, Mr David Pannick QC, pointed out in his opinion to the HKSAR Government that the proposals in the consultation paper are consistent with the protection of human rights.

The Bill is based on existing legislation. All provisions will be interpreted by the Hong Kong courts in accordance with the common law principles. Mainland legal concepts will in no way be extended to Hong Kong.

Compliance with Article 39 of the Basic Law explicitly specified

To further protect human rights, the Bill explicitly specifies that all provisions must be enforced, applied and interpreted in accordance with Article 39 of the Basic Law. In other words, the provisions must comply with the standards of international human rights covenants.

Freedom of speech will not be undermined

The proposed offence of 'sedition' under the Bill adopts the existing common law concept of 'incitement'. Under common law, 'inciting' others to commit a substantive offence, such as murder or theft, is itself an offence

To convict a person of the common law offence of 'incitement', the prosecution must prove beyond reasonable doubt that :
(a) *he has compelled or encouraged others to commit a crime; and*
(b) *he has the intention that others, after being incited by him, shall commit the crime.*
Therefore, if the person does not believe that others would commit the offence incited, he does not commit an offence of 'incitement' because he lacks the requisite intention.

Sedition is defined in the Bill to mean 'inciting' others to commit treason, secession or subversion, or inciting others to engage in violent public disorder which would seriously endanger the stability of the PRC. The offence is firmly based on common law principles and is consistent with the international standards on protection of freedom of speech. The scope of criminal law has not been expanded.

Freedom of the press is fully protected

To ensure that the offence of unlawful disclosure would not impede the freedom of the press and the free flow of information, and to ensure that the Government remains open and transparent, the Bill explicitly stipulates that the interpretation of the provisions of unlawful disclosure must also comply with Article 39 of the Basic Law.

When investigating any of the Article 23 offences, judicial warrants must be obtained before journalistic materials can be searched or seized. The proposed emergency investigation powers will not apply to the search and seizure of journalistic materials.

Judicial safeguards

The independence and integrity of the judiciary of Hong Kong is well-recognized by the international community.

Provisions implementing Article 23 are local laws, and will operate entirely within the existing common law framework. The rights of residents are fully protected.

As an additional safeguard, the Bill further provides that the consent of the Secretary for Justice must be obtained before prosecution of the relevant offences can be instituted.

The Bill clearly stipulates that people charged with treason, secession, subversion, sedition or unlawful disclosure will either be tried by jury or given a right to opt for jury trial if they so wish. Whether a person is convicted would ultimately be determined by a jury. Jurors are selected randomly from members of the public, thus guaranteeing that the widely accepted social values will be reflected.

加港文獻館

To find out more about the Bill to implement Article 23 of the Basic Law, please obtain the text of the Bill at the Public Enquiry Service Centres of District Offices or visit the website:
www.basiclaw23.gov.hk

